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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. DAVID LOUIS FULTON, Defendant and Appellant.	C058389 (Super. Ct. No. NCR72573)

A jury convicted defendant David Louis Fulton of evading an officer with willful or wanton disregard (Veh. Code, § 2800.2, subd. (a); count I) and driving on a suspended license, a misdemeanor (Veh. Code, § 14601.1, subd. (a); count II). In bifurcated proceedings, defendant waived his right to a jury determination and entered a negotiated admission to a prior prison term allegation (Pen. Code, § 667.5, subd. (b)) in exchange for dismissal of the remaining allegations.

After denying defendant's motion to withdraw his admission to the prior prison term allegation, the trial court sentenced defendant to state prison for an aggregate term of four years.

Defendant appeals. With respect to his admission of the prior prison term, defendant filed a request but did not obtain

a certificate of probable cause (Pen. Code, § 1237.5). He contends (1) insufficient evidence supports his conviction for evading in that there was no evidence that an illuminated red lamp was visible from the front of the officer's vehicle, (2) the trial court failed to instruct the jury on one of two theories of guilt for evading and it cannot be determined which theory the jury relied upon in reaching its verdict, (3) his conviction for driving on a suspended license must be reversed because the trial court failed to instruct that defendant knew his license was suspended, (4) he did not knowingly and intelligently waive his constitutional rights in admitting the prior prison term allegation, and (5) the record is ambiguous as to the trial court's imposition of fees and fines for driving on a suspended license (count II). We agree that the record is ambiguous with respect to the fees and fines imposed on count II and will remand for clarification. We reject defendant's remaining contentions and will otherwise affirm the judgment.

FACTS

About 10:25 a.m. on September 4, 2007, Tehama County Deputy Sheriff Stephen Hoag and Deputy Sheriff Knox were on patrol in Los Molinos when they saw an older model pickup truck with no license plates and two occupants. Each deputy wore a uniform which consisted of a "tan shirt, name plate, badge, green pants . . . . duty belt, sidearm, handcuffs, [and] flashlight." The deputies were in a white patrol vehicle which was marked "Sheriff" on the side and on the back. The patrol vehicle had "a light bar on top" and was "equipped with red forward-facing lights." Deputy Hoag turned on the overhead lights to stop the

pickup truck. The pickup truck sped away at a high rate, "screeching [] the tires." Deputy Hoag then activated the patrol siren. The pickup truck failed to stop at a stop sign, turned left onto the highway, causing traffic to "brake heavily to avoid a collision," and drove erratically, "fishtailing back and forth," and entered a dirt parking lot, passing pedestrians and other vehicles, including a tow truck. The tow truck driver, Ted Smith, heard over the police scanner that the deputies were in pursuit of the pickup truck and saw the pickup truck pass within five feet of the tow truck, making eye contact with the driver, defendant. Smith also saw the sheriff's patrol vehicle which had on its lights and siren.

The pickup truck continued and failed to stop at a railroad crossing where the guard arms were coming down, hitting one of the arms. The pickup truck turned onto a dirt access road and collided with a barrier of brush, stopping the pickup truck. Deputy Hoag was about 20 to 30 yards behind the pickup truck at the time. The pickup truck's driver and passenger got out and ran in opposite directions. The driver, defendant, had brown hair and was wearing a dark colored T-shirt and blue jeans. Deputy Hoag pursued defendant on foot. Defendant crossed the railroad tracks and headed back towards the highway. Deputy Hoag was unable to find defendant but heard over his radio that Deputy Knox had detained someone in the front yard of a home. Deputy Knox had driven the patrol car to the area where defendant had fled. So did Smith who had been watching defendant get out of the pickup truck and run. Smith drove his tow truck after defendant, stopped in an intersection, got out

and confronted defendant. Defendant tried to hit Smith who was chasing defendant. Smith grabbed defendant and knocked him to the ground. Smith positively identified defendant as the driver of the pickup truck.

Deputy Hoag found that defendant had been detained by Deputy Knox and Smith. Defendant wore a dark shirt and blue jeans. When Deputy Hoag asked defendant what he was doing, defendant responded that he had a suspended license and did not want to go to jail. Defendant stated that he had been using the pickup truck to transport debris to another location.

Defendant did not testify and called no witnesses to testify on his behalf. Defense counsel questioned Deputy Hoag concerning the lack of a description of the passenger in his report. Deputy Hoag believed that the passenger had dark hair and a medium build, the same as defendant. Defense counsel elicited that defendant did not own the truck and no fingerprints were taken from the truck. Defense counsel also elicited that defendant never stated that he had been driving. Defense Exhibit A, a drawing by Smith of the direction his tow truck was facing while listening to the scanner, was admitted into evidence.

DISCUSSION

I

Defendant first contends that insufficient evidence supports his conviction for felony evading because there was no evidence that Deputy Hoag activated the forward-facing red lamp. We find sufficient evidence supports defendant’s conviction.

In considering a sufficiency of the evidence claim, we view the evidence in the light most favorable to the judgment, presume in support of the judgment every fact which may be reasonably deduced from the evidence, and "determine, in light of the whole record whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 510; *People v. Stanley* (1995) 10 Cal.4th 764, 792-793; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Felony evading (Veh. Code, § 2800.2, subd. (a)) occurs when "a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property." The prosecution must prove, inter alia, that "[t]he peace officer's motor vehicle [] exhibit[ed] at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp." (Veh. Code, § 2800.1, subd. (a)(1).)

Here, defendant claims there was no evidence that the officer activated the red lights. We disagree.

Deputy Hoag testified that his patrol car had a light bar on top that included a forward-facing red light and that when he attempted to pull the pickup truck over, he activated the light bar. The jury could reasonably conclude that the emergency lights the deputy activated included the red forward-facing light.

Defendant's reliance upon *People v. Brown* (1989) 216 Cal.App.3d 596 (*Brown*) and *People v. Acevedo* (2003) 105

Cal.App.4th 195 (*Acevedo*) is misplaced. In *Brown,* the officer testified that her patrol car had three light signals (flashing amber light to the rear, blinking blue and white lights to the front and rear, and a rotating red, white and blue lights) and each was activated by a separate switch position. The officer testified that she could not recall which switch position she activated. (*Brown, supra*, 216 Cal.App.3d at pp. 599-600.)

In *Acevedo*, the officer testified that he activated his overhead emergency lights and siren in his pursuit of the defendant. The officer did not testify that his overhead lights included a forward-facing red light. (*Acevedo, supra,* 105 Cal.App.4th at pp. 197-199.)

Here, Deputy Hoag did not testify that his patrol car had three light signals with separate switch positions. *Brown* is thus distinguishable. Deputy Hoag testified that he had a light bar with a forward-facing red light and that he activated his light bar when he tried to stop defendant. *Acevedo* is thus distinguishable.

Because defendant does not otherwise challenge the evidence adduced at trial to support the offense of felony evading, we will not discuss the evidence further. Sufficient evidence supports his conviction for felony evading.

II

Defendant next challenges the instruction on the felony evading offense. He argues that the trial court gave the jury two theories to support the offense, that is, property damage or at least three violations of the law, and it cannot be determined which theory the jury relied upon in reaching its

verdict. Further, as defendant notes, the trial court failed to define the violations of the law, that is, the failure to stop at a stop sign, the failure to stop at the railroad crossing, driving on a suspended license, and reckless driving. We conclude that no unanimity was required as to the means of committing felony evading and that any error in failing to define the violations of the law was harmless beyond a reasonable doubt.

In instructing the jury on felony evading, the trial court gave the jury CALCRIM No. 2181 which provided:

"The defendant is charged in Count 1 with evading a peace officer with wanton disregard for safety.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. A peace officer driving a motor vehicle was pursuing the defendant;

"2. The defendant, who was also driving a motor vehicle, willfully fled from or tried to elude the officer, intending to evade the officer;

"3. During the pursuit, the defendant drove with willful or wanton disregard for the safety of persons or property;

"AND

"4. All of the following were true:

"a. There was at least one lighted red lamp visible from the front of the peace officer's vehicle;

"b. The defendant either saw or reasonably should have seen the lamp;

"c. The peace officer's vehicle was sounding a siren as reasonably necessary;

"d. The peace officer's vehicle was distinctively marked;

"AND

"e. The peace officer was wearing a distinctive uniform.

"A person employed as a police officer by Tehama County Sheriff's Department is a peace officer.

"Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"A person acts with wanton disregard for safety when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, and (2) he or she intentionally ignores that risk. The person does not, however, have to intend to cause damage.

"Driving with willful or wanton disregard for the safety of persons or property includes, but is not limited to, causing damage to property while driving or committing three or more violations that are each assigned a traffic violation point.

"Failure to stop at a stop sign, Vehicle Code section 21802; driving on a suspended license, Vehicle Code section 14601.1(a); failure to stop at a railroad crossing, Vehicle Code section 22451(b); and, reckless driving, Vehicle Code section 23103(a), are each assigned a traffic violation point.

"A vehicle is distinctively marked if it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look

different from vehicles that are not used for law enforcement purposes.

"A distinctive uniform means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough."

Willful or wanton conduct is shown by, but is not limited to, defendant "causing damage to property while driving or committing three or more violations that are each assigned a traffic violation point." (Judicial Council of California Jury Instructions (2006-2007) CALCRIM No. 2302.) "[W]here a statute prescribes disparate alternative means by which a single offense may be committed, no unanimity is required as to which of the means the defendant employed so long as all the members of the jury are agreed that the defendant has committed the offense as it is defined by the statute. It follows that even though the evidence establishes that the defendant employed two or more of the prescribed alternate means, and the jury disagrees on the manner of the offense, there is no infirmity in the unanimous determination that the defendant is guilty of the charged offense." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 613 (*Sutherland*).)

The drunk driving with injury statute (Veh. Code, § 23153, subd. (a)) was considered in *People v. Mitchell* (1986) 188 Cal.App.3d 216 (*Mitchell*). *Mitchell* concluded that unanimity was not required, that is, the jury was not required to determine whether defendant violated the basic speed law or

engaged in a speed contest, in driving under the influence and committing an act forbidden by law that causes injury to another person. (*Id.* at p. 218.) *Mitchell* stated: "[T]he jurors need not be instructed that to return a verdict of guilty they must all agree on the specific theory -- it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged as it is defined by the statute." (*Id.* at p. 222.)

We find *Mitchell* to be analogous. The jury did not have to agree on the specific theory, that is, whether defendant caused property damage or committed three or more driving violations, as long as the jury agreed defendant drove with willful or wanton disregard for the safety of persons or property. There was evidence that all of the traffic violations and property damage occurred while defendant was driving the car. The jury could have believed defendant caused damage to property (guard arm) or committed all three traffic violations. Unanimity on the legal theory was not required in the prosecution of defendant for a single act of felony evading, that is, driving in a willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer. Further, due process did not require an unanimity instruction. (*People v. Wilson* (2008) 44 Cal.4th 758, 801-802; *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919; *Sutherland, supra,* 17 Cal.App.4th at pp. 618-619.)

The trial court did not define the violations of the law at all. It simply cited the Vehicle Code sections for each violation, that is, failure to stop at a stop sign, failure to

stop at a railroad crossing, driving on a suspended license, and reckless driving. The violations are not commonly understood nor were the violations adequately conveyed by the instruction given.[1] (See *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1334-1339.) Nevertheless, the error was harmless beyond a reasonable doubt. There was no dispute that defendant ran a stop sign, failed to stop at a railroad crossing, hitting one of the guard arms as it came down, and drove recklessly, fishtailing, screeching his tires, causing traffic to skid to avoid a collision, and sped past pedestrians in a dirt parking lot, as Deputy Hoag testified. Further, the parties stipulated the defendant's driver's license was suspended. The only issue defendant disputed at trial was whether he was the driver of the pickup truck. Any error was harmless beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 504-507.)

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[1] For example, failure to stop at a railroad crossing is not so straightforward. Vehicle Code section 22451 provides:

"(a) The driver of any vehicle or pedestrian approaching a railroad or rail transit grade crossing shall stop not less than 15 feet from the nearest rail and shall not proceed until he or she can do so safely, whenever the following conditions exist:

"(1) A clearly visible electric or mechanical signal device or a flagman gives warning of the approach or passage of a train or car.

"(2) An approaching train or car is plainly visible or is emitting an audible signal and, by reason of its speed or nearness, is an immediate hazard.

"(b) No driver or pedestrian shall proceed through, around, or under any railroad or rail transit crossing gate while the gate is closed.

"(c) Whenever a railroad or rail transit crossing is equipped with an automated enforcement system, a notice of a violation of this section is subject to the procedures provided in Section 40518."

III

Defendant contends his conviction for the driving on a suspended license must be reversed because the instruction removed the requirement that the prosecution prove that defendant *knew* his license was suspended. The Attorney General initially responds that the invited error doctrine applies. We conclude that any error was harmless beyond a reasonable doubt.

In discussing the jury instruction on the charged offense of driving on a suspended license, the following discourse ensued:

"The Court: . . . It's instruction 2220, driving with suspended or revoked license. Probably needs some modification in view of the stipulation.[2]

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2 CALCRIM No. 2220 provides:

"The defendant is charged [in Count ____] with driving while (his/her) driving privilege was suspended/[or] revoked) [in violation of _____ <*insert appropriate code section[s]*>].

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant drove a motor vehicle while (his/her) driving privilege was (suspended/[or] revoked) (for _____ <*insert basis for suspension or revocation*>];

"AND

"2. When the defendant drove, (he/she) knew that (his/her) driving privilege was (suspended/ [or] revoked).

"[If the People prove that:

"1. The California Department of Motor Vehicles mailed a notice to the defendant telling (him/her) that (his/her) driving privilege had been (suspended/[or] revoked);

"[¶] . . . [¶]

"[Prosecutor]: Asking the Court for clarification here.

"The Court: Well, under -- it's paragraph or Subparagraph 1, I guess, under Number 2. Number 2 is when the defendant drove he knew that his driver's license was suspended. It goes on, if the people prove that, one, the California Department of Motor Vehicles mailed a notice to the defendant telling him his driver's license had been suspended; two, the notice was sent to the most recent address reported to the Department, or any more recent address reported by the person to a law enforcement agency; and three --

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"2. The notice was sent to the most recent address reported to the department [or any more recent address reported by the person, a court, or a law enforcement agency];

"AND

"3. The notice was not returned to the department as undeliverable or unclaimed;

"Then you may, but are not required to, conclude that the defendant knew that (his/her) driving privilege was (suspended/[or] revoked).]

"[If the People prove beyond a reasonable doubt that a court informed the defendant that (his/her) driving privilege had been (suspended/[or] revoked), you may but are not required to conclude that the defendant knew that (his/her) driving privilege was (suspended/[or] revoked).]

"[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/ _____ <*insert other type of motor vehicle*>).]

"[The term *motor vehicle*] is defined in another instruction to which you should refer.]"

"[Defense counsel]: As since [*sic*] we stipulated his driver's license was suspended, we could just modify that to prove the defendant guilty of the crime [] [t]he [P]eople must prove that the defendant drove a motor vehicle while his driver's license was suspended. And then we could just say there was a stipulation that his driver's license is suspended.

"[Prosecutor]: People would be fine with that.

"The Court: Doesn't have to be any mention made of failure to appear then on Number 1?

"[Prosecutor]: No.

"The Court: All right. So after the instruction reads, the defendant drove a motor vehicle while his driver's license was suspended, period. And then you wanted language to the effect the parties have stipulated that the defendant's license was suspended?

"[Defense counsel]: Yes.

"[Prosecutor]: Yes, your Honor. And then I want the date on the suspended.

"[Defense counsel]: At the time of the offense, yes.

"[Prosecutor]: That's fine, your Honor.

"[Defense counsel]: On September 4th.

"[Prosecutor]: September 4, 2007.

"The Court: Okay. Let me go over this and make sure it's clear. I'm going to read it as follows: Defendant is charged in Count 2 with driving while his driver's license was suspended. [¶] To prove that the defendant is guilty of this crime, the [P]eople must prove that, one, the defendant drove a motor vehicle while his driver's license was suspended. Parties

have stipulated defendant's driver's license was suspended at the time of the offense -- of the alleged offense, September 4, 2007. And that would be the entirety of the instruction. Everything on the printed form after failure to appear would be stricken, correct?

"[Defense counsel]: Correct, your Honor."

Defense counsel and the prosecutor stipulated in front of the jury that "on September 4th 2007, that [defendant's] privilege to operate a motor vehicle in California was suspended." As defendant argues, the parties did not stipulate that defendant knew his license was suspended. The instruction on the charged offense of driving on a suspended license removed the element of knowledge.[3]

However, we find any error harmless beyond a reasonable doubt. "An instructional error that improperly describes or omits an element of the crime from the jury's consideration is subject to the 'harmless error' standard of review set forth in *Chapman* . . . . [Citation.]" (*People v. Lamas* (2007) 42 Cal.4th 516, 526.) There was uncontradicted evidence of defendant's knowledge. When Deputy Hoag arrested defendant,

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[3] The trial court instructed the jury on driving on a suspended license as follows:

"The defendant is charged in Count 2 with driving while his driver's license was suspended. To prove that the defendant is guilty of this crime, the [P]eople must prove that the defendant drove a motor vehicle while his driver's license was suspended. Parties have stipulated that the defendant's driver's license was suspended at the time of the alleged offense, September 4th, 2007."

defendant stated that he had a suspended license and did not want to go to jail. Defense counsel's only challenge to such testimony was whether defendant stated that he was driving. The only issue raised by defense counsel in argument was that the prosecutor had failed to show defendant was the driver of the pickup truck. On this record, the evidence was uncontradicted that defendant knew his license was suspended. The instructional error was harmless beyond a reasonable doubt.

IV

Defendant next contends that in admitting the prior prison term allegation, he did not knowingly and intelligently waive his right against self-incrimination and right to confrontation. We reject this contention.

In substance, defendant's claim challenges the validity of his plea to the prior prison term allegation. To raise this claim, defendant must have a certificate of probable cause. (Pen. Code, § 1237.5; *People v. Panizzon* (1996) 13 Cal.4th 68, 76.) He failed to obtain a certificate. Thus, this court lacks jurisdiction to consider his challenge to the entry of his plea to the prior prison term allegation. (Cal. Rules of Court, rule 8.304(b).)

V

Finally, defendant contends that the record is ambiguous with respect to the court's imposition of the financial obligations on count II. The Attorney General agrees.

The court imposed a $20 court security fee on both counts. For the misdemeanor driving offense in count II, the court imposed a concurrent six-month term and ordered defendant to

"pay a fine in the amount of $1,100; pay that amount including security fee, restitution fine, and penalty assessments." The court suspended the fine on count II pending defendant's successful completion of parole on count I. The clerk's minutes reflect the $20 court security fee and the $1,100 fine on count II. The abstract of judgment does not reflect sentencing on count II. With respect to count II, the probation report had recommended that the court impose a $1,100 fine "including a security fee, restitution fine, and penalty assessments."

The abstract of judgment must reflect all fees and fines; the inclusion of the fees and fines assists state and local agencies in collection. (Pen. Code, § 1205, subd. (c); *People v. High* (2004) 119 Cal.App.4th 1192, 1200.)

The statutory maximum fine for a violation of Vehicle Code section 14601.1, subdivision (a), is $1,000. As defendant argues and the Attorney General concedes, the record is ambiguous as to the base amount of the fine and the penalty assessments.

We will remand to the trial court for clarification of the fees and fines imposed on count II and for a corrected/amended abstract of judgment.

DISPOSITION

The matter is remanded to the trial court for clarification of the fees and fines imposed for driving on a suspended license, a misdemeanor, count II, and amendment/correction of the abstract to so reflect. A certified copy of the amended/corrected abstract of judgment is to be forwarded to the

Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

SIMS, Acting P. J.

We concur:

DAVIS, J.

HULL, J.